

No. 80878-3

MADSEN, J. (concurring)—I agree with the lead opinion that development rights do not vest with the filing of a site plan application. Rather, Washington law provides that the filing of a complete building permit application vests development rights. RCW 19.27.095(1). However, I write separately to acknowledge Abbey Road Group’s legitimate concern about the City of Bonney Lake’s building permit application process, though I conclude that here Abbey Road’s failure to submit a building permit application is fatal to providing relief.

#### Discussion

In *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 52-53, 720 P.2d 782 (1986), this court held that a city may not reserve for itself sole discretion to determine the date of vesting by conditioning completion of a building permit application on prior city approval of the developer’s site plan. Specifically, the Bellevue ordinance in *West Main* prohibited the filing of a building permit application for any proposed project until all of the following procedures were complete: “(1) administrative design review approval; (2) site plan review approval; (3) administrative conditional use approval; (4) modification

of landscaping approval; (5) design review approval by the planning commission; (6) passage by the city council of any necessary ordinance approving a conditional use, shoreline conditional use, planned unit development or planned residential unit development; (7) approval by the board of adjustment of a variance or shoreline variance; and (8) issuance of a shorelines substantial development permit.” *Id.* at 49. The ordinance also expressly provided no building permit application would be accepted until any appeals with respect to the first four requirements were completed, should appeal be sought. Finally, the ordinance provided that only the filing of a building permit application would vest development rights; filing of applications for any of the preliminary approvals would not.

Abbey Road argues that, as in *West Main*, Bonny Lake’s application process conditions the submission of a building permit application on prior city approval of site plans and is, therefore, invalid under *West Main*. Indeed, the city’s building permit application includes a checklist of materials to be submitted with the application, including one line which calls for six copies of the approved site development plans. Although the hearing examiner noted that the applicant can check the “not applicable” box by the line for approved site development plans, Abbey Road points out that every item on the checklist has a “not applicable” box next to it. It convincingly reasons that an applicant cannot check that box for all items and reasonably assume that the application would be

complete for vesting purposes. Abbey Road asserts that a better explanation for the “not applicable” boxes is that in some circumstances a particular item may not apply to the particular project. For example, an approved site development plan would not be applicable to a building permit for a remodel of an existing building.

Abbey Road correctly points out that Bonney Lake’s process, according to its checklist, can be read to require approval of a site development as a prerequisite to filing a building permit application. However, unlike the City of Bellevue in *West Main*, no ordinance or regulation prohibits a developer from filing a building permit application at the same time that a site development plan is filed. Nor does Bonney Lake’s checklist preclude approval of a site development plan at the same time as a building permit application is submitted. Because Abbey Road did not even attempt to file a building permit application, it cannot show that Bonney Lake would have refused such an application or whether the city would deem its application to be incomplete without an *approved* site development plan. Thus Abbey Road has failed to prove that Bonney Lake’s process violates due process. *Id.* at 52-53.

I agree with the remainder of the lead opinion’s reasoning and its result.

AUTHOR:

Justice Barbara A. Madsen

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WE CONCUR:

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Justice Mary E. Fairhurst

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